

**IN THE SUPREME COURT OF MISSOURI**

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In the Matter of the Verified Application  
and Petition of Liberty Energy (Midstates)  
Corp d/b/a Liberty Utilities to Change its  
Infrastructure System Replacement  
Surcharge, and

Missouri Public Service Commission,

Respondents,

v.

The Office of Public Counsel,

Appellant.

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Case No. SC94470

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**SUBSTITUTE BRIEF OF RESPONDENT  
MISSOURI PUBLIC SERVICE COMMISSION  
IN RESPONSE TO APPELLANT'S SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

The Public Service Commission of the State of Missouri (Commission) adopts the jurisdictional statement in the substitute brief of the Office of the Public Counsel (Public Counsel).

## **STATEMENT OF FACTS**

The Commission is dissatisfied with the statement of facts in Public Counsel's substitute brief because Public Counsel's statement of facts is argumentative in contravention of Rule 84.04(c) of the Missouri Rules of Civil Procedure. Subsection A of Public Counsel's statement of facts also relies heavily on material that is contained in its appendix but is outside of the record on appeal. Material in an appendix that does not otherwise appear in the legal file is not part of the record and is not considered by the reviewing court. *U.S. Bank v. Lewis*, 326 S.W.3d 491, 496 (Mo. App. 2010). The Commission files its own statement of facts in accordance with Rule 84.04(f) of the Missouri Rules of Civil Procedure.

### Parties

The Commission is the state agency responsible for regulating investor-owned utilities in the state, including gas corporations. (L.F. 259). Public Counsel, at its discretion, represents the interests of Missouri ratepayers in cases before the Commission and on appeal of those cases. (L.F. 253). The Staff of the Public Service Commission (Staff) is an independent party in all Commission investigations, contested cases, and other proceedings, unless it timely notifies the Commission of its intent not to participate in a case. (L.F. 253).

Liberty Energy (Midstates) Corp. d/b/a Liberty Utilities (Liberty Utilities or Liberty) is a Missouri corporation. (L.F. 253). Liberty Utilities is a wholly owned subsidiary of Liberty Energy Utilities Company, which in turn is a wholly owned subsidiary of Liberty Utilities Company. (L.F. 253). Liberty Utilities is a “gas corporation” and a “public utility” as defined by Missouri law. (L.F. 253). As a gas corporation and a public utility, Liberty Utilities is subject to regulation by the Commission. (L.F. 259).

#### Liberty Utilities Acquisition of Atmos Tariffs

In 2012, Liberty Utilities acquired substantially all of the Missouri assets of regulated gas utility Atmos Energy Corporation (Atmos). (L.F. 253-54). The Commission issued new certificates of convenience and necessity for Liberty Utilities to serve the areas formerly served by Atmos. (L.F. 254). The Commission also approved the adoption of Atmos’s tariffs by Liberty Utilities. (L.F. 254). Liberty Utilities also adopted Atmos’s Infrastructure System Replacement Surcharge (ISRS) tariffs. (L.F. 254). As Atmos did, Liberty Utilities has a separate ISRS tariff for each of its three rate districts. (L.F. 252).

ISRS charges are charges that are collected to cover the cost of eligible system replacement projects. (L.F. 252). ISRS charges are collected through a surcharge on customer bills. (L.F. 255). The Commission has the statutory authority to approve ISRS rate schedules outside of a general rate case. (L.F. 254-55).

#### Liberty Utilities Application

On July 2, 2013, Liberty Utilities filed a *Verified Application and Petition of Liberty Utilities to Change its Infrastructure Replacement Surcharge* (application) with

the Commission. (L.F. 254). This application was the utility's second request to change the ISRS initially approved in a 2010 rate case. (L.F. 254).<sup>1</sup> The first change to the ISRS was approved in February of 2011, before Liberty Utilities acquired the Missouri assets of Atmos. (L.F. 254). In this second application, Liberty Utilities sought permission to adjust its ISRS rate schedules to recover costs for eligible projects for the period from June 1, 2012 through May 31, 2013. (L.F. 252). Liberty Utilities has three different rate districts: WEMO, SEMO, and NEMO (L.F. 255). Liberty Utilities has different ISRS surcharges for each of its three rate districts. (L.F. 258). Liberty Utilities' application sought to change the ISRS surcharge in each of its rate districts. (L.F. 252). The Commission suspended the proposed ISRS tariffs until October 30, 2013. (L.F. 252).

Staff filed a report recommending a number of changes and adjustments to Liberty Utilities' proposed ISRS calculations. (L.F. 252). Staff also filed subsequent amendments and revisions to its initial recommendations. (L.F. 252). Staff recommended that the Commission reject Liberty Utilities' proposed ISRS tariffs and approve ISRS tariffs based on Staff's determination of the appropriate revenue figures and rates. (L.F. 252).

Public Counsel's witness reviewed 50 of the 275 projects included in Liberty Utilities' application. (Tr. 29; L.F. 256). Public Counsel's witness did not identify any specific project that should not have been included in the ISRS recovery. (L.F. 261).

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<sup>1</sup> The 2010 rate case (Commission Case No. GR-2010-0192) occurred while Atmos was still operating in Missouri. Liberty Utilities adopted the rates approved in the 2010 rate case when it began service in the state.



Public Counsel filed a request that the Commission reject the application. (L.F. 252). Alternatively, Public Counsel requested that the Commission hold an evidentiary hearing. (L.F. 252). The Commission held an evidentiary hearing in response to Public Counsel's request for a hearing. (L.F. 252). No other parties intervened in the application case. (L.F. 252).

In its application, Liberty Utilities provided detailed information with headings and project descriptions to demonstrate that the projects were appropriate for recovery through ISRS surcharges. (L.F. 255). In response to an objection by Public Counsel, Liberty Utilities also provided references to a Commission statute or rule in support of each project's eligibility for recovery through an ISRS surcharge. (L.F. 255). The ISRS recovery amount proposed in Liberty Utilities' application exceeds one-half of one percent of its base revenue level approved by the Commission in the company's most recent general rate case. (L.F. 255). Under the applicable statutes, the Commission had 120 days to act on Liberty Utilities' application to change its ISRS surcharge. (L.F. 38).

Staff auditors and members of the Energy unit conducted an investigation of Liberty Utilities' request for changes to its ISRS surcharge. (L.F. 256). Of the 275 separate projects identified by Liberty Utilities, Staff's investigation examined 36 Liberty Utilities work orders. (L.F. 256). The work orders examined by Staff totaled approximately \$2.2 million. (L.F. 256). The \$2.2 million represented about 58% of the total amount requested by Liberty Utilities in its application. (L.F. 256). Staff would have the time and resources to examine significantly more orders in a general rate case. (L.F. 256).

The work orders examined by Staff provided enough information to demonstrate that the projects involved replacement of steel or polyethylene pipe. (L.F. 256). Some projects included the installation of either gas safety valves or excess flow valves. (L.F. 256). The work orders noted the age of the pipe being replaced and any corrosion or other defects. (L.F. 256). Staff also reviewed the work orders to determine if they met Liberty Utilities' threshold for capitalization and whether they improved the safety and integrity of the gas system. (L.F. 256). Staff determined that the work orders involved pipe replacements that improved the integrity of the system rather than maintenance expenses such as wrapping pipe. (L.F. 256).

Staff also examined the project sub-ledger. (L.F. 256). The sub-ledger included detailed information such as whether a project included material, supplies, overhead, or labor and whether the project was performed for system integrity or for growth. (L.F. 256). Some expenses that were included in Liberty Utilities' application may have been the result of third-party damage to the system. (L.F. 256).

Liberty Utilities' initial calculation included some growth projects. (L.F. 257). Staff removed those growth projects when it performed its own calculations. (L.F. 257). Staff also identified several errors or omissions in Liberty Utilities' calculations. (L.F. 257). The errors or omissions identified by Staff related to summation errors, ineligible projects, accumulated depreciation, deferred income taxes, property taxes, depreciation rates, conversion factors, and formula errors. (L.F. 257). Staff made adjustments to Liberty Utilities' ISRS request based on the errors it identified, including the removal of growth projects that were ineligible for ISRS recovery. (L.F. 257; Tr. 76-77). Staff

calculated a revised cumulative ISRS revenue requirement and updated the rate design. (L.F. 257). Liberty Utilities agreed with Staff's adjusted calculations. (L.F. 257).

The projects in the adjusted ISRS consist of: (a) Mains, valves, service lines, regulator stations, vaults, and other pipeline system components installed to comply with state or federal safety requirements as replacements for existing facilities that have worn out or are in deteriorated condition; (b) Main relining projects, service line insertion projects, joint encapsulation projects, and other similar projects extending the useful life or enhancing the integrity of pipeline system components undertaken to comply with state or federal safety requirements; or (c) Facilities relocations, required due to construction or improvement of a highway, road, street, public way, or other public work by or on behalf of the United States, this state, or another entity having the power of eminent domain. (L.F. 258).

The projects remaining after Staff performed its adjustments are gas utility plant projects that: (a) Did not increase revenues by directly connecting new customers; (b) are in service and used and useful; (c) Were not included in rate base in the most recent general rate case; and (d) Replaced or extended the useful life of existing infrastructure. (L.F. 258). Staff's evidence showed that the Commission should approve an incremental ISRS revenue requirement of \$579,662. (L.F. 266).

Public Counsel did not present any evidence that the calculations made by Staff and agreed to by Liberty Utilities were incorrect. (L.F. 258). Public Counsel did not present evidence of an ISRS revenue requirement or rates that were based on its own calculations. (L.F. 257). The Commission found that Staff's evidence was more credible

than Public Counsel's evidence. (L.F. 256). The evidence presented by Staff's witness was more detailed and more precise than the evidence presented by Public Counsel's witness. (L.F. 256).

After hearing, the Commission issued a report and order authorizing Liberty Utilities to establish a changed ISRS sufficient to recover revenues of \$572,662. (L.F. 267-68). The authorized ISRS surcharge consists of \$30,432 for the WEMO district, \$178,799 for the SEMO district, and \$370,430 for the NEMO district. (L.F. 268). Staff reviewed the tariff filing and determined that it was in compliance with the report and order. (L.F. 257).

Public Counsel filed an amended application for rehearing. (L.F. 305-306). The Commission denied the amended application for rehearing. (L.F. 329). Public Counsel appealed to the Court of Appeals for the Western District. (L.F. 332-334). The Court of Appeals affirmed the Report and Order. (Commission Appendix to Substitute Brief, p. A21). This Court granted Public Counsel's application for transfer.

### Post-Appeal

The ISRS statutes require that ISRS rates be reset to zero following the utility's next general rate case or, if no general rate case has been filed, after an ISRS has been in place for three years. Sections 393.1012.3 and 393.1015.6. While this appeal was ongoing, Liberty Utilities had a general rate case at the Commission.<sup>2</sup> As part of the resolution of the rate case, Liberty Utilities, Public Counsel and other parties entered into

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<sup>2</sup> Commission Case No. GR-2014-0152

a stipulation and agreement to address the utility's ISRS going forward. (L.F. 79). The stipulation and agreement provides for the creation of a regulatory liability account in the amount of \$111,149 to be used as a mechanism for the return of money to customers in the event that the Court reverses and remands the report and order in this case. (Substitute Brief of Liberty Utilities, pp. 21-22). In the event that Public Counsel prevails in this appeal, the \$111,149 in the regulatory liability account will be subject to true up at the Commission. (Substitute Brief of Liberty Utilities, p. 22). If the report and order is affirmed, no amount will be credited to ratepayers. (Substitute Brief of Liberty Utilities). The Commission approved that stipulation and agreement as part of the report and order resolving the rate case. (Commission Appendix to Substitute Brief, p. 48). The report and order setting new rates for Liberty Utilities became effective on January 2, 2015. (Commission Appendix to Substitute Brief, p. A44).

Public Counsel filed a timely application for rehearing from the report and order in the rate case. [Commission Appendix to Substitute Brief, p. A84). The application for rehearing raises three issues, including the resolution of the ISRS for Liberty Utilities that was a part of the stipulation and agreement approved by the Commission. (Commission Appendix to Substitute Brief, p. A84). The Commission denied the application for rehearing on January 21, 2015. (Commission Appendix to Substitute Brief, p. A89). Public Counsel has until February 20, 2015 to file a notice of appeal from the rate case under Section 386.510. The new Liberty Utilities tariffs approved by the Commission became effective on January 4, 2015. (Commission Case No. GR-2014-0152).

## POINTS RELIED ON

- I. The report and order must be affirmed because it is lawful under Section 386.510 in that the Commission has the statutory authority to approve an Infrastructure System Replacement Surcharge and the projects approved for inclusion in Liberty Utilities' ISRS tariffs are eligible projects within the meaning of Sections 393.1009, 393.1012, and 393.1015. (Responds to Public Counsel's point relied on).**

### Statutes

**Section 386.430, RSMo (2000)**

**Section 386.500, RSMo (2000)**

**Section 386.510, RSMo (2000) (West 2015)**

**Section 393.270, RSMo (2000)**

**Section 393.130, RSMo (2000) (West 2015)**

**Section 393.1009, RSMo (2000) (West 2015)**

**Section 393.1012, RSMo (2000) (West 2015)**

**Section 393.1015, RSMo (2000) (West 2015)**

### Cases

***State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732 (Mo.banc 2003)**

***In re Laclede Gas Co.*, 417 S.W.3d 815 (Mo. App. 2014)**

***State ex rel. Sprint Mo., Inc. v. Pub. Serv. Comm'n*, 165 S.W.3d 160 (Mo.banc 2005)**

***State ex rel. Pub. Council v. Pub. Serv. Comm'n*, 397 S.W.3d 441 (Mo. App. 2013)**

## ARGUMENT

- I. The Report and Order must be affirmed because it is lawful under Section 386.510 in that the Commission has the statutory authority to approve an Infrastructure System Replacement Surcharge and the projects approved for inclusion in Liberty Utilities' ISRS tariffs are eligible projects within the meaning of Sections 393.1009, 393.1012, and 393.1015.**

A threshold question in any appeal is the mootness of the controversy. *Dotson v. Kander*, 435 S.W.3d 643, 644 (Mo.banc 2014). If an intervening event occurs that makes a decision by the appellate court unnecessary or the granting of effectual relief impossible, the case is moot and the appeal should be dismissed. *Id.* When determining whether or not a case is moot, the reviewing court is permitted to consider evidence outside of the record. *State ex rel. Reardon v. Reed*, 41 S.W.3d 470, 473 (Mo.banc 2001). An ISRS terminates upon the approval of new rates by the Commission. Section 393.1012.3. In general, a tariff that is superseded by a later filed tariff becomes moot and is not subject to further consideration. *State ex rel. KCP&L Greater Mo. Operations Co. v. Pub. Serv. Comm'n*, 408 S.W.3d 153, 160 (Mo. App. 2013). “Invocation of [an] exception to the mootness doctrine is within this [c]ourt’s discretion when it is demonstrated that the case in question presents an issue that[:] (1) is of general public interest; (2) will recur; and (3) will evade appellate review in future live controversies.” *Id.* (internal quotation and citation omitted).

The ISRS tariff that is the subject in this case terminated when the Commission approved new rates for Liberty Utilities. Because that tariff has been superseded, it is not subject to consideration in this Court. Because of the stipulation and agreement that was approved as a part of the resolution of the rate case, this Court could choose to decide whether or not the ISRS should have been included in the ISRS surcharge approved by the Commission. Even that issue may not satisfy an exception to the mootness doctrine because Public Counsel has raised the issue of the ISRS in its application for rehearing of the rate case that terminated the ISRS and it is possible that the issue could be resolved on appeal of that rate case. No other issue remains a live controversy and no other issue should be decided in this appeal because the case is moot in light of the subsequent rate case.

### Standard of Review

The Commission's orders are presumed to be valid. *State ex rel. Utility Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo.banc 1979). The party challenging an order of the Commission has the burden of proving that the challenged order is invalid. Section 386.430, RSMo (2000). "Missouri courts have long recognized that where the decision involves the exercise of regulatory discretion, PSC is delegated a large amount of discretion and 'many of its decisions necessarily rest in the exercise of a sound judgment.'" *State ex rel. Sprint Mo., Inc. v. Pub. Serv. Comm'n*, 165 S.W.3d 160, 164 (Mo.banc 2005), quoting *State ex rel. Dyer v. Pub. Serv. Comm'n*, 341 S.W.2d 795, 802 (Mo. 1960), *cert. denied*, 366 U.S. 924, 81 S.Ct. 1351, 6



L.Ed.2d 384 (1961). The reviewing court does not substitute its own judgment for that of the Commission in areas that are within the Commission's expertise. *Id.*

The reviewing court must determine whether the challenged order is lawful and reasonable. Section 386.510, RSMo (2000) (West 2015). An order is lawful if the Commission had statutory authority to issue the order. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo.banc 2003). "[L]egal issues are reviewed *de novo*." *Id.* An order is reasonable if it is "supported by substantial and competent evidence on the whole record." *Id.* at 735. The reviewing court "considers the evidence together with all reasonable supporting inferences in the light most favorable to the Commission's order." *Id.* Factual findings made by the Commission are presumed correct. *Id.* If the evidence supports conflicting factual conclusions, the reviewing court is bound by the Commission's factual findings. *AG Processing, Inc.*, 120 S.W.3d at 735.

#### Review of non-contested cases is for lawfulness

In non-contested cases, the Commission's order is reviewed only for its lawfulness. *In re Laclede Gas Co.*, 417 S.W.3d 815, 819 (Mo. App. 2014). This case is a non-contested case in which no hearing is required under Section 393.1015.2(3), RSMo (2000) (West 2015). *Id.* A case involving only the interpretation of a statute is decided as a matter of law. *Id.*

" . . . [A] gas corporation providing gas service may file a petition and proposed rate schedules with the commission to establish or change ISRS rate schedules that will allow for the adjustment of the gas corporation's rates and charges to provide for the recovery of eligible infrastructure system replacements." Section 393.1012.1, RSMo

(2000) (West 2015). The Commission may approve an ISRS surcharge provided that the surcharge exceeds one-half of one percent of the utility's base revenue level as approved by the Commission in the utility's last general rate case. *Id.* The Commission may not approve an ISRS surcharge that would produce annualized ISRS revenues in excess of ten percent of the utility's base revenue level as approved by the Commission in the utility's last general rate case. *Id.* The procedure that the Commission must follow when a petition is filed is set out in Section 393.1015.

The report and order is lawful because the Commission has the statutory authority to approve or adjust a utility's ISRS tariffs. The ISRS tariffs approved by the Commission met the statutory criteria for ISRS surcharges in that the surcharges approved exceeded one half of one percent of Liberty Utilities' base revenue level as determined in the utility's last rate case and the ISRS surcharge approved will not produce annualized ISRS revenues in excess of ten percent of the utility's base revenue level as approved by the Commission in the utility's last general rate case. (L.F. 255).

The statute outlining the ISRS approval process does not require a hearing. Because this case is a non-contested case, the Court is not required to review the reasonableness of the report and order and may affirm the order under the lawfulness prong of Section 386.510. If this Court determines that the report and order should be reviewed for reasonableness because a hearing was held, an evidentiary record, and the Commission made findings of fact and conclusions of law even though it was not required by statute, the report and order should be affirmed under the reasonableness

prong of Section 386.510 because it is supported by competent and substantial evidence upon the whole record.

**A. The Commission’s interpretation of the ISRS statute is consistent with the plain and ordinary meaning of the phrase “worn out or are in deteriorated condition.”**

The Commission is allowed to approved recovery of an ISRS surcharge for eligible projects. “Eligible infrastructure system replacements” are “gas utility plant projects” that meet the following criteria:

- (a) Do not increase revenue by directly connecting the infrastructure replacement to new customers;
- (b) Are in service and used and useful;
- (c) Were not included in the gas corporation’s rate base in its most recent general rate case; and
- (d) Replace or extend the useful life of an existing infrastructure.

Section 393.1009(3), RSMo (2000) (West 2015). “Gas utility plant projects” include only:

- (a) Mains, valves, service lines, regulator stations, vaults, and other pipeline system components installed to comply with state or federal safety requirements as replacements for existing facilities that have worn out or are in deteriorated condition;
- (b) Main relining projects, service lines, insertion projects, joint encapsulation projects, and other similar projects extending the useful life or enhancing the

integrity of the pipeline system components undertaken to comply with state or federal safety requirements; and

- (c) Facilities relocations required due to construction or improvement of a highway, road, street, public way, or other public work by or on behalf of the United States, this state, a political subdivision of this state, or another entity having the power of eminent domain provided that the costs related to such project have not been reimbursed to the gas corporation.

Section 393.1009(5), RSMo (2000) (West 2015). Only the projects that fall under subsection (a) are at issue in this case. Specifically, the issue is whether the projects approved by the Commission for inclusion in Liberty Utilities' ISRS tariffs fall within the meaning of the phrase "worn out or are in deteriorated condition." This Court must examine the statutory language to give effect to the legislative intent behind its use of this statutory language:

The rules of statutory interpretation are not intended to be applied haphazardly or indiscriminately to achieve a desired result. Instead, the canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended. This Court's primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue. *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo.banc 2008). Other rules of statutory interpretation, which are diverse and sometimes conflict, are merely aids that allow this Court to ascertain

the legislature's intended result. *Edwards v. St. Louis County*, 429 S.W.2d 718, 722 (Mo.banc 1968). *See also Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo.banc 2008) (providing construction of statutes is not to be hyper-technical, but reasonable and logical and to give meaning to the statutes).

*Parktown Imports, Inc. v. Audi of America, Inc.*, 278 S.W.3d 670, 672-73 (Mo.banc 2009). "In the absence of a statutory definition, words will be given their plain and ordinary meaning as derived from the dictionary." *State ex rel. Mogas Pipeline, LLC v. Pub. Serv. Comm'n*, 366 S.W.3d 493, 498 (Mo.banc 2012). The Court affords weight to the Commission's interpretation of statutes that are administered by the Commission. *Sprint, Mo., Inc.*, 165 S.W.3d at 164. When examining the meaning of language used in a statute, the reviewing court considers the context of other statutes that address the same subject matter as well as cognate sections. *In re KCP&L Greater Mo. Operations Co.*, 408 S.W.3d 175, 186 (Mo. App. 2013). The Court will look beyond the plain language of a statute only where it is ambiguous or where the plain meaning of the words used would lead to a result that it illogical or absurd. *State ex rel. Valentine v. Orr*, 366 S.W.3d 534, 540 (Mo.banc 2012). Liberty Utilities is required to provide "safe and adequate" service to its customers. Section 393.130.1, RSMo (2000) (West 2015).

There is no need to look beyond the plain language of the statute in this case. Public Counsel argues that the phrase "facilities that are worn out or are in deteriorated condition" in Section 393.1009(5)(a) means only system components that have been degraded because of the passage of time and cannot include system components that are

damaged and are replaced for reasons that are not related to their age. (App. Sub. Br. pp. 21-24). Public Counsel’s strained reading of Section 393.1009(5)(a) should be rejected. Public Counsel does not provide any Missouri case law in support of its reading of the ISRS statutes. The Commission found that Public Counsel’s definition was too narrow:

“Deteriorated” is not defined in the statutes but has been defined commonly as “to lower in quality, character or value”.<sup>3</sup> A pipe damaged by a third party is in a deteriorated condition and, therefore, an eligible project because it has been lowered in character, quality, or value, although that deterioration has occurred quicker than what happens normally through the passage of time. In addition, these projects and the capitalized leak repairs performed by Liberty also qualify as eligible projects because they are “similar projects extending the useful life or enhancing the integrity of pipeline system components. . .”<sup>4</sup>

(L.F. 263).

Public Counsel’s reading of the ISRS statute is too restrictive. The intent of the ISRS statutes is to allow gas utilities to recover the costs of eligible infrastructure replacement projects between rate cases. The construction would have a negative effect on the utility’s ability to timely recover infrastructure replacement projects that are

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<sup>3</sup> *The American Heritage Dictionary*, Second College Edition, p.387. The Court of Appeals reached the same conclusion as the Commission using a definition of “deteriorate” in *Webster’s Third New International Dictionary of the English Language Unabridged*, 616 (1993). *In re Liberty Energy (Midstates) Corp.*, Slip Op., p. 4.

<sup>4</sup>Section 393.1009(5)(b), RSMo Supp. 2012.

essential to the safety and integrity of the system. The maintenance of the system is integral to a gas utility's ability to provide safe and adequate service as required by Section 393.130.1. If there is damage to the infrastructure that may impair or disrupt service, it makes little difference to the integrity of the system or to the people it serves exactly how that damage came about.

If the legislature had intended an ISRS tariff to include only infrastructure system replacement projects that were in poor condition because of age, it could simply have used the phrase "worn out" instead of "worn out or deteriorated." Public Counsel's reading of the statute renders the words "or deteriorated" superfluous and unnecessary. This Court should not adopt a statutory interpretation that renders some statutory language meaningless. Public Counsel has not made any argument that overcomes the Commission's reading of the ISRS statute or the weight that should be afforded to the Commission's interpretation of statutes that it is responsible for administering. Public Counsel's reading of the statute also gives gas utilities a disincentive to engage in infrastructure replacements that protect the integrity of the system because it would limit the ability to recover the cost of replacement projects between rate cases except in very narrow circumstances. The plain language of the statute does not compel the result urged by Public Counsel. The report and order should be affirmed on this point.

**B. The Commission's interpretation of the ISRS statutes is consistent with legislative intent.**

The appellate courts "should give such construction to the orders of the commission as will effectuate the legislative intent." *State ex rel. Pitcairn v. Pub. Serv.*

*Comm'n*, 110 S.W.2d 367, 370 (Mo. App. 1937). “Rules of statutory construction should be subservient to legislative intent.” *State ex rel. Sch. Dist. of Kansas City v. Young*, 519 S.W.2d 328, 332 (Mo. App. 1975). The Court of Appeals has recently examined the legislative intent of the ISRS statutes and found the “obvious” legislative intent of the ISRS statutes is “to permit the gas company to timely recover its costs for government-mandated infrastructure system replacement projects via a rate adjustment outside of a general rate case for a limited period of time.” *In re Laclede Gas Co.*, 417 S.W.3d at 823.

To establish or change an ISRS, the utility must file a petition that is accompanied by the proposed rate schedules for the ISRS and the documentation that supports the calculations in the proposed rate schedules. Section 393.1015.1(1). Once a petition to establish or change an ISRS is filed, the Commission is required to examine the petition. Section 393.1015.2(1). The Commission’s Staff has 60 days from the filing of the petition to conduct an examination of the application and accompanying calculations submitted by the utility. Section 393.1015.2(2). The Staff may file a report with the Commission outlining the findings of its examination no later than 60 days after the application is filed. *Id.* The Commission “may” hold a hearing on the application and proposed tariffs. Section 393.1015.2(3). The Commission “shall issue an order to become effective not later than one hundred twenty days after the petition is filed.” *Id.* “If the commission finds that a petition complies with the requirements of sections 393.1009 to 393.1015, the commission shall enter an order authorizing the corporation to impose an ISRS that is sufficient to recover appropriate pretax revenue, as determined by the



commission pursuant to the provisions of sections 393.1009 to 393.1015.” Section 393.1015.2(4).

The Commission is limited to consideration of the following factors in determining the appropriate level of pretax revenue for recovery in an ISRS:

- (1) The current state, federal, and local income tax or excise rates;
- (2) The gas corporation’s actual regulatory capital structure as determined during the most recent general rate proceeding of the gas corporation;
- (3) The actual cost rates for the gas corporation’s debt and preferred stock as determined during the most recent general rate proceeding of the gas corporation;
- (4) The gas corporation’s cost of common equity as determined during the most recent general rate proceeding of the gas corporation;
- (5) The current property tax rate or rates applicable to the eligible infrastructure system replacements;
- (6) The current depreciation rates applicable to the eligible infrastructure system replacements; and
- (7) In the event information pursuant to subdivisions (2), (3), and (4) of this subsection is unavailable and the commission is not provided with such information on an agreed-upon basis, the commission shall refer to the testimony submitted during the most recent general rate proceeding of the gas corporation and use, in lieu of any such unavailable information, the recommended capital structure, recommended cost rates for debt and preferred stock, and recommended

cost of common capital equity that would produce the average weighted cost of capital based upon the various recommendations contained in such testimony.

Section 393.1015.4. A reconciliation must be performed at the end of each calendar year to make adjustments as necessary to reconcile any difference between the amount collected under the ISRS tariffs and the appropriate pretax revenues that should have been collected based on the Commission's order approving the ISRS tariffs. Section 393.1015.5(2). A utility with an ISRS tariff "shall file revised rate schedules to reset the ISRS to zero when new base rates and charges become effective" following a Commission order setting new rates for the utility. Section 393.1015.6(1). When setting rates in a general rate case, the Commission can review the prudence of costs that have been included in an ISRS and the ISRS does not bind the Commission to any rate-making treatment in the rate case. Section 393.1015.8; Section 393.1015.9; Section 393.1015.10.

The Commission's interpretation of the ISRS statutes in the report and order is consistent with the legislative intent of those statutes. The Commission's Staff is given 60 days to examine the application filed by the utility. The Commission must issue an order within 120 days of the filing of the application. The factors that the Commission can look at in an ISRS application are limited. If the utility has complied with the applicable ISRS statutes, the Commission is required to issue an order that allows the utility to recover an appropriate ISRS surcharge. The ISRS must be reconciled every year and the ISRS is reset to zero in the utility's next general rate case. The Commission retains the right to review the prudence of ISRS costs outside of the application process.

The legislature intended the establishment or change of an ISRS to be completed within 120 days. The Commission Staff and the Commission did what is required of them to review the application and to issue an order within the statutory framework. The Commission does not have the discretion to refuse an ISRS if the statutory criteria are met. A hearing is discretionary and not mandatory. The manner in which the Commission handled the application in this case is lawful for this reason. Additionally, the record reflects that the Commission's findings with respect to the granting of the application were reasonable because they were supported by the competent and substantial evidence in the record.

The Commission's Staff performed an audit of a portion of the projects submitted in Liberty Utilities' application. (L.F. 256). Staff made appropriate adjustments to the application. (L.F. 257). Liberty Utilities agreed to the adjustments made by Staff. (L.F. 257). A fuller and more comprehensive review of infrastructure replacement projects is possible in a rate case. (L.F. 256). The Commission may also order appropriate adjustments to the ISRS in a rate case. (L.F. 257).<sup>5</sup>

The Commission's interpretation of the ISRS statutes was lawful and reasonable. The process followed by the Commission to approve the ISRS tariffs comported with the requirements of the ISRS statutes. The Commission relied on the evidence of its Staff,

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<sup>5</sup> New rates for Liberty Utilities have gone into effect while this appeal has been pending. The ISRS tariffs at issue in this case terminated at the effective date of the new rates approved by the Commission. Section 393.1012.3.

which found that the projects included in the application were properly included, with certain adjustments. There is no evidence in the record that any projects have been improperly included in the tariffs approved by the Commission. The report and order should be affirmed on this point.

#### Section 386.500

No party may raise an argument on appeal of a Commission order or decision unless that argument has first been raised in an application for rehearing filed before the Commission. Section 386.500.2, RSMo (2000). The only “narrow” exception to the requirements of Section 386.500.2 is to challenge the Commission’s subject matter jurisdiction. *State ex rel. Int’l Telecharge, Inc. v. Pub. Serv. Comm’n*, 806 S.W.2d 680, 687 (Mo. App. 1991). An argument will not be decided on appeal where a lower court has been denied the opportunity to address the alleged error. *Khulusi v. Sw. Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 230-21 (Mo. App. 1995).

Public Counsel’s substitute brief makes arguments that are significantly different from the arguments that were made in its amended application for rehearing. (L.F. 305). Those new and significantly different arguments are improperly before this Court under Section 386.500.2 and should be disregarded. Public Counsel has not argued that the Commission does not have jurisdiction over the subject matter underlying this appeal, so the single exception to the rule in Section 386.500.2 does not apply. The only argument that was raised in the amended application for rehearing that is still at issue in this case is whether recovery of costs attributable to third-party damage is permitted in an ISRS surcharge.

**C. The Commission's approval of the ISRS tariffs at issue here was an appropriate use of a statutory mechanism approved by the legislature.**

In setting rates, the Commission must generally consider all factors that are relevant to the determination of a just and reasonable rate. Section 393.270.4, RSMo (2000). When rates are adjusted without consideration of all relevant factors, it is known as single-issue ratemaking. *State ex rel. Pub. Council v. Pub. Serv. Comm'n*, 397 S.W.3d 441, 448 (Mo. App. 2013). Single-issue ratemaking is prohibited in Missouri unless the legislature has explicitly authorized the Commission to use a specific ratemaking mechanism outside of a general rate case. *Id.* Sections 393.1009, 393.1012, and 393.1015 are explicit legislative authorization for the use of a ratemaking mechanism to be used outside of general rate cases for the recovery of infrastructure replacement projects.

The ISRS statutes include appropriate safeguards against the potential issues associated with single-issue ratemaking. A gas corporation may not have an initial ISRS approved by the Commission unless it has had a general rate case within the last three years. Section 393.1012.2. An ISRS is subject to upper and lower limits with respect to the amount of ISRS revenue that may be recovered in relation to the utility's overall revenue requirement. Section 393.1012.1. The Commission retains the right to conduct prudence reviews of a utility's ISRS within a rate case or a complaint case. Section 393.1015.9; Section 393.1015.10. The fact that a utility has an ISRS does not bind the Commission to any particular ratemaking treatment. Section 393.1015.8. An ISRS cannot be in place for more than three years unless the utility has filed a new general rate case. Section 393.1012.3.

One area where the Commission has relatively little discretion is in the area of whether or not to approve a utility's application to establish or change an ISRS if the statutory requirements have been met. The Commission's Staff has 60 days to file a report regarding the application. Section 393.1015.2(2). The Commission has 120 days to issue an order in an application case. Section 393.1015.2(3). The Commission may hold a hearing within that 120 day window, but it is not required to do so. *Id.* The Commission is limited in the factors that it may consider in determining whether or not to grant an ISRS. Section 393.1015.4. If the Commission determines that the statutory criteria are met, the Commission must allow the utility to "impose an ISRS that is sufficient to recover appropriate pretax revenue. . ." Section 393.1015.2(4).

The legislature intended that the application process would not last more than 120 days, including a 60 day period for the Staff to file a report with respect to the application, and that an order would be in place within that time. The Commission and its Staff both followed the statutory procedure to change an ISRS in this case, and there is no basis for Public Counsel's argument that the ISRS statutes have been violated. The ISRS statutes should not be construed against the Commission based on the facts of this case. The report and order should be affirmed on this point.

### **CONCLUSION**

For the above reasons, the Commission respectfully requests that the Court affirm the report and order in its entirety. Alternatively, the Commission requests that the Court order the case to be retransferred to the Court of Appeals for the Western District. The Commission requests such other relief the Court deems just and proper.

## **CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify that the foregoing Respondent's Brief of the Public Service Commission of the State of Missouri complies with the limitations contained in Rule 84.06(c) and that:

1. The signature block above contains the information required by Rule 55.03;
2. The brief complies with limitations contained in Rule 84.04(b);
3. The brief contains 6480 words, as determined by the word count feature of Microsoft Word.

I further certify that copies of the foregoing have been served by means of electronic filing to the following counsel of record this 26<sup>th</sup> day of January, 2015 to:

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